EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

{SHOW }

PROCEEDINGS AND ORDERS

DATE: 11248

CASE NBR 86-1-00021 CFX
SHORT TITLE INS
VERSUS Hector, Virginia

DOCKETED: Jul 10 1986

Date	Proceedings and Orders
Apr 30 1986	Application for extension of time to file petition and order granting same until July 10, 1986 (Brennan, May 1, 1986).
Jul 10 1986	Petition for writ of certiorari filed.
Aug 11 1986	Order extending time to file response to petition until September 10, 1986.
Sep 10 1985	DISTRIBUTED. September 29, 1986
Sep 11 1986	Motion of respondent for leave to proceed in forma pauperis filed.
Sep 11 1986	Brief of respondent Virginia Hector in opposition filed.
Sep 19 1986	Reply brief of petitioner INS filed.
Oct 6 1986	Motion of respondent for leave to proceed in forma pauperis GRANTED. Justice Scalia OUT.
Oct 3 1986	REDISTRIBUTED. October 10, 1986
Oct 14 1986	REDISTRIBUTED. October 17, 1986

CONTINUE {

PROCEEDINGS AND ORDERS

DATE: 112486

CASE NBR 86-1-00021 CFX
SHORT TITLE INS
VERSUS Hector, Virginia

DOCKETED: Jul 10 1986

Date	Proceedings and Orders
Oct 24 1986	REDISTRIBUTED. October 31, 1986
Nov 3 1986	REDISTRIBUTED. November 7, 1986
Nov 10 1986	REDISTRIBUTED. November 14, 1986
Nov 17 1986	Petition GRANTED. Judgment REVERSED. Justice Brennan would grant the petition and set the case for oral argument. Dissenting statement by Justice Marshall. Opinion per curiam.

****

86- 21

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

VIRGINIA HECTOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
ROBERT H. KLONOFF
Assistant to the Solicitor General
EILEEN A. CARTY
ALISON R. DRUCKER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

45 pp

QUESTION PRESENTED

Whether an alien may demonstrate extreme hardship to "his * * * child" for purposes of obtaining a suspension of deportation under the Immigration and Nationality Act of 1952 by showing hardship to persons who do not fall within the statutory definition of "child."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

VIRGINIA HECTOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is reported at 782 F.2d 1028 (Table). The opinions of the Board of Immigration Appeals (App., *infra*, 9a-14a) and of the immigration judge (App., *infra*, 15a-19a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1985. A petition for rehearing, with suggestion for rehearing en banc, was denied on February 10, 1986 (App., *infra*, 8a). On May 1, 1986, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including July 10, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. 8 U.S.C. 1254(a) provides in pertinent part:

As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 1251(a)(19) of this title) who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence * * *.

2. 8 U.S.C. 1101(a)(35) provides:

The term[s] "spouse", "wife", or "husband" do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.

3. 8 U.S.C. 1101(b) provides:

As used in subchapters I and II of this chapter—

(1) The term "child" means an unmarried person under twenty-one years of age who is—

(A) a legitimate child;

(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred;

(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes places before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation;

(D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;

(E) a child adopted while under the age of sixteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: *Provided*, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

(F) a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been

adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence; *Provided*, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: *Provided further*, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.

4. 8 U.S.C. 1101(b)(2) provides:

The terms "parent", "father", or "mother" mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection.

STATEMENT

1. Respondent, a native and citizen of Dominica, West Indies, entered the United States in April 1975 as a nonimmigrant visitor for pleasure. She was authorized to stay in the United States until April 30, 1975, but remained beyond that date without obtaining permission from immigration authorities. Respondent is unmarried and has four children. Three of her children are natives and citizens of Dominica and live there with respondent's parents. Respondent's youngest child, who was eight years old at the time of the court of appeals' decision in this case, lives with her in the United States. Two of respondent's nieces are United States citizens; at the time of the

court of appeals' decision, they were nine and ten years old and had been living with respondent for two years. Those nieces, whose parents reside in Dominica, came to the United States to attend school here. App., *infra*, 1a-2a.

2. In July 1982, the Immigration and Naturalization Service (INS) charged respondent with deportability under Section 241(a)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1251(a)(2). At the deportation hearing, respondent conceded deportability and applied for suspension of deportation pursuant to Section 244(a)(1) of the Act, 8 U.S.C. 1254(a)(1). App., *infra*, 2a. Section 244(a)(1) authorizes the Attorney General, in his discretion, to suspend deportation of a deportable alien, if the alien can show that (1) he has been physically present in the United States for a continuous period of at least seven years immediately preceding the application for suspension of deportation; (2) he has been a person of good moral character during that seven year period; and (3) deportation would result in extreme hardship to the alien or to his spouse, parent, or child who is a United States citizen or a lawful permanent resident. 8 U.S.C. 1254(a)(1).

3. The immigration judge denied respondent's request for suspension of deportation on both statutory and discretionary grounds (App., *infra*, 15a-19a). The judge found that, while respondent had been physically present in the United States for seven years and was a person of good moral character, she had failed to meet the requisite showing of extreme hardship (App., *infra*, 16a-19a). Based on the evidence at the hearing—which showed that respondent's mother, father, brothers, sisters, and three of respondent's children all lived in Dominica—the judge concluded that respondent's ties appeared stronger in Dominica than in the United States. Moreover, the judge found that respondent was young, healthy, and able to support herself. As a result, the judge ruled that respond-

ent had not established extreme hardship to herself. App., *infra*, 17a, 19a. In addition, the judge found that there was insufficient evidence to support respondent's claim that her child would suffer extreme hardship as a result of purportedly better educational opportunities in the United States than in Dominica (App., *infra*, 17a-18a), and therefore concluded that respondent had failed to establish extreme hardship to her child as well (App., *infra*, 19a).

The immigration judge refused to consider whether the respondent's two nieces would suffer extreme hardship as a result of respondent's deportation. Respondent had argued that the nieces should be viewed as her children, for purposes of 8 U.S.C. 1254(a)(1), because of the close relationship she had with them. In rejecting that argument, the immigration judge stated (App., *infra*, 19a):

> The argument that the Respondent has a parental relationship with the two children is without precedent and the Court has—cannot—find any such fixed relationship existing. Even, assuming arguendo, that such precedent exists, the fact [is] that the Respondent has resided with these two children, for only a year and a half and it's difficult to find * * * that the children would have replaced their mother and father, with the Respondent.

The immigration judge granted respondent a voluntary departure within three months, but ruled that she would be deported to Dominica if she did not leave within that time (*ibid.*).

4. On appeal to the Board of Immigration Appeals (BIA), respondent argued that under the Third Circuit's decision in *Tovar* v. *INS*, 612 F.2d 794 (3d Cir. 1980), the immigration judge had erred in refusing to consider the

hardship to her two nieces.[1] In rejecting respondent's contention, the BIA noted (App., *infra*, 13a):

> We * * * conclude that it was not error, in an assessment of extreme hardship, for the immigration judge to circumscribe the respondent's testimony concerning the hardships which her nieces may encounter if she returns to Dominica. The statute does not specifically denominate nieces among those family members whose hardships, if extreme, would permit suspension of deportation. * * * [R]espondent's nieces lived for most of their formative years in Dominica with their own parents, who continue to reside there, and * * * they only recently arrived in this country to live with their aunt while they attended school here. The respondent's association with her nieces is therefore not so emotionally intense nor of such longstanding duration so as to supplant the children's relation with their parents.

The BIA found the facts in *Tovar* distinguishable, since in *Tovar* the grandson of the alien had lived with the alien since infancy and viewed the alien as his biological parent (*ibid.*).[2] Accordingly, the BIA found respondent's contentions without merit and dismissed the appeal (App., *infra*, 14a).

---

[1] In *Tovar*, the Third Circuit held that the hardship to an alien's grandson should, under the facts of that case, be considered by the immigration judge at the deportation proceeding (612 F.2d at 797-798).

[2] The BIA further ruled that, even if it assumed arguendo that the hardship to the nieces should be considered, extreme hardship had not been shown because the nieces' closest ties were with their own parents. Separation from their aunt would not be particularly severe and, in any event, if the nieces returned to Dominica as a result of their aunt's departure, they would be reunited with their own parents. App., *infra*, 13a-14a. In addition, the BIA ruled that respondent had not demonstrated extreme hardship to herself, merely because of the possibility of a reduced standard of living in Dominica, particularly

5. Respondent then appealed to the court of appeals, again relying on *Tovar*. The court agreed with the immigration judge and the BIA that respondent had failed to demonstrate extreme hardship to herself or her son (App., *infra*, 3a). Nonetheless, the court agreed with respondent that *Tovar* was applicable, and therefore reversed the decision of the BIA (App., *infra*, 3a-5a). The court reasoned (App., *infra*, 5a (citations omitted)) that

> It is important that [respondent] at least be given an opportunity to present evidence of hardship to her nieces, since a court must determine hardship based upon a consideration of the deportation's combined effect on the entire protected class (those persons named in § 1254(a)(1)).

The Court indicated (App., *infra*, 4a-5a) that, notwithstanding this Court's intervening decisions in *INS* v. *Jong Ha Wang*, 450 U.S. 139 (1981), and *INS* v. *Phinpathya*, 464 U.S. 183 (1984), the *Tovar* decision, rendered in 1980, was "still good law." It concluded that "the immigration judge erred by refusing even to hear testimony that could have shown that, despite the short time [respondent] and her nieces had lived together, a relationship of mother and child did exist" (App., *infra*, 4a).[3]

---

since her return to that country would reunite her with her family (App., *infra*, 11a-12a). The BIA also ruled that respondent had not shown extreme hardship to her son, simply because of lower living standards, reduced educational opportunity, and separation from family and friends in the United States if he accompanied respondent to Dominica (App., *infra*, 12a-13a).

[3] The court also indicated that the BIA had not "address[ed] meaningfully" all factors bearing on the hardship determination because it had not focused on hardship to the nieces (App., *infra*, 4a). Judge Garth, in dissent, took issue with the court on that point, reasoning that the BIA had adequately considered, inter alia, the relationship between respondent and her nieces and any hardship to respondent or the nieces from deportation (App., *infra*, 5a n.1). Judge Garth did not challenge the majority's view that *Tovar* was still good law; he simply ruled that the BIA had conducted a sufficient factual inquiry and that a remand was, therefore, unnecessary. Cf. *INS* v. *Bagamasbad*, 429 U.S. 24 (1976) (where immigration judge denied application for adjustment of status to that of permanent resident alien based on discretionary grounds, no reason to remand for advisory opinion on whether statutory eligibility requirements were met).

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question of immigration law concerning the statutory requirements for the exceptional remedy of suspension of deportation under Section 244(a)(1) of the Act, 8 U.S.C. 1254(a)(1). That Section provides a discretionary remedy whereby an alien can obtain suspension of deportation if he can demonstrate extreme hardship to himself or to "his spouse, parent, or child." The court of appeals held that, in applying Section 244(a)(1), the immigration authorities erred in not considering hardship to the alien's nieces. In so holding, the court completely ignored the Act's detailed definition of "child" (8 U.S.C. 1101(b)(1)), a definition that does not include nieces.

There is a direct conflict in the circuits on this issue of whether INS must consider hardship to individuals not identified in the statute in determining whether an alien is entitled to suspension of deportation. The First Circuit has taken the same approach as the Third Circuit on this issue. See *Antoine-Dorcelli* v. *INS*, 703 F.2d 19 (1st Cir. 1983). The Fifth and Ninth Circuits, by contrast, have ruled that the courts are not free to expand the statutory category of "child" in determining eligibility for suspension of deportation. See *Zamora-Garcia* v. *United States Dep't of Justice INS*, 737 F.2d 488 (5th Cir. 1984); *Contreras-Buenfil* v. *INS*, 712 F.2d 401 (9th Cir. 1983). Under the approach of the First and Third Circuits, so long as an alien alleges a de facto parent-child relationship with someone, evidence on the scope of that relationship and

on the hardship to that person must be considered. The result is to impose a substantial additional administrative burden in suspension hearings by requiring that immigration authorities admit and consider evidence on those issues.

Moreover, the court of appeals' decision cannot be reconciled with this Court's decisions in *INS* v. *Phinpathya, supra, INS* v. *Jong Ha Wang, supra*, and *Fiallo* v. *Bell*, 430 U.S. 787 (1977). *Phinpathya* and *Jong Ha Wang* make clear that the suspension of deportation remedy is a narrow one and cannot be judicially expanded. *Fiallo* makes clear that the courts cannot ignore Congress's definition of "child" under the Act and substitute their own broader definitions.

For these reasons, review by this Court is plainly warranted.

1. Section 244(a)(1) of the Act, 8 U.S.C. 1254(a)(1), provides that an alien applying for suspension of deportation must demonstrate, inter alia, "extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence * * *." The terms "spouse," "parent," and "child" are explicitly defined in the Act. See 8 U.S.C. 1101(a)(35) (defining spouse), 8 U.S.C 1101(b)(1) (defining child for purposes of subchapters I and II); 8 U.S.C. 1101(b)(2) (defining parent for purposes of subchapters I and II); 8 U.S.C. 1101(c)(1) (defining child for purposes of subchapter III); 8 U.S.C. 1101(c)(2) (defining parent for purposes of subchapter III). Since Section 244(a)(1) is part of subchapter II, the definition of child contained in 8 U.S.C. 1101(b)(1) is the applicable one. That provision defines a child as an unmarried person under twenty one years of age who is (1) a legitimate child; (2) a stepchild, whether or not born out of wedlock, so long as the marriage creating that step relationship occurred before the child reached 18 years of age; (3) a child legitimated by the age of 18, provided certain specified requirements are met; (4) an illegitimate child, but only in relation to his or her natural mother; (5) a child adopted while under age 16, if the child has been in the legal custody of, or resided with, the adopting parent(s) for at least two years; and (6) an orphan for whom an immediate-relative petition had been filed before the orphan reached the age of 16, provided that certain specified requirements are met. 8 U.S.C. 1101(b)(1). It is immediately apparent that a niece is not included within this comprehensive definition of an alien's "child."

2. The legislative history of the Act demonstrates that Congress carefully formulated the statutory definition of "child" to delimit the Act's coverage.[4] Prior to the passage of the Act, copies of predecessor bills were circulated to interested government agencies, including INS, and the suggestions of those agencies were considered by Congress in drafting the Act. See *Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings Before the Subcomm. of the Comm. on the Judiciary*, 82d Cong., 1st Sess. 2-3 (1951). The INS Office of General Counsel provided analyses of two bills—S. 3455, 81st Cong., 2d Sess. (1950) (introduced in the 81st Congress) and S. 716, 82d Cong., 1st Sess. (1951) (introduced in the 82d Congress). See Analysis of S. 3455—81st Cong., prepared by the General Counsel, Immigration and Naturalization Service (1950) [hereinafter cited as S. 3455

[4] Indeed, Congress specifically emphasized the basic importance of the definitional section of the Act (8 U.S.C. 1101). As the House report explained (H.R. Rep. 1365, 82d Cong., 2d Sess. 31 (1952)):

> [S]ince many of those definitions are determinative of the application of other provisions of the bill, that section must be considered as one of the most important segments of the proposed legislation.

The legislation history further stated that while some definitions were "self-explanatory and require[d] no further elaboration" (*ibid.*), the "more significant ones [were] discussed in some detail" (*ibid.*). One of the definitions that received elaboration was the definition of "child" (*id.* at 33). See also S. Rep. 1137, 82d Cong., 2d Sess. 3, 5 (1952).

Analysis]; Analysis of S. 716—82d Cong., prepared by the General Counsel, Immigration and Naturalization Service (1951) [hereinafter cited as S. 716 Analysis]; see generally *Costello* v. *INS*, 376 U.S. 120, 126 n.9 (1964) (citing both INS analyses). In its analysis of S. 3455, INS recognized that the suspension of deportation provision of the bill "[did] not specify the person or persons to whom * * * hardship would be caused if deportation of the alien was ordered" (S. 3455 Analysis 244-5). When S. 716 was drafted to provide that the hardship inquiry should focus on the "immediate family," INS expressed concern that those words, which were not defined in the bill, were "obscure, uncertain and difficult, if not impossible, to administer" (S. 716 Analysis 244-2). It pointed out that such words "might conceivably be claimed to include *any* relative of the alien, by blood or marriage, who might be living with him in his household" (*id.* at 244-3 (emphasis in original)). INS therefore "strongly recommend[ed] that Congress either indicate clearly and specifically the nature of the hardship and the particular relatives who are intended to be described, or that there be removed completely from [that] paragraph any references to such matters" (*ibid.*).

The version finally adopted by Congress dealt with the issue raised by INS by referring explicitly to the alien's "spouse," "parent," and "child" (8 U.S.C. 1254(a)(1)) as the persons to be considered, along with the alien, for hardship purposes. Moreover, Congress provided detailed definitions of those three terms (8 U.S.C. 1101(a)(35), (b)(1) and (b)(2) respectively). In addition, Congress made clear, with respect to its definition of "child," that uniform application of that term was intended. As the legislative history of the Act indicated: "Section 101(b)(1) provides the definition of 'child' which contains *uniform* considerations to be applied in determining whether that status exists in the application of the provisions of titles I and II of the bill." H.R. Rep. 1365, 82d Cong., 2d Sess. 33 (1952) (emphasis added); see also S. Rep. 1137, 82d Cong., 2d Sess. 5 (1952).

Since the enactment of the Act in 1952, Congress has amended the definition of "child" on several occasions.[5] In 1957, Congress amended the definition to provide that for immigration purposes, an illegitimate child should be considered a child of its natural mother. Act of Sept. 11, 1957, Pub. L. No. 85-316, § 2, 71 Stat. 639. That amendment also expanded the definition of child to include a child adopted while under the age of 14, if the child has been in the legal custody of, or resided with, the adopting parent for at least two years (*ibid.*). In 1961, Congress amended the definition by including as a "child" an orphan who meets the various requirements. Act of Sept. 26, 1961, Pub. L. No. 87-301, §§ 1-4, 75 Stat. 650-651. The language of the orphan provision was modified in 1965. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 8(c), 79 Stat. 917. In 1981, the definition of child was modified to raise the maximum qualifying age for adoptions from 14 to 16. Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 2(b), 95 Stat. 1611. These changes demonstrate that Congress carefully drafted and modified the meaning of "child" to respond to particular issues or problems. At no point did Congress abandon its objective of providing a precise definition that would be uniformly applied; to the contrary, each amendment underscored that Congress, not the courts, was to determine the meaning of child under the Act.[6]

---

[5] The original definition, enacted in 1952, provided that a child was an unmarried legitimate or legitimated child or stepchild under the age of twenty one. See *Fiallo* v. *Bell*, 430 U.S. 787, 797 (1977) (discussing original definition of "child").

[6] Congress's deliberate effort to define the term "child" precisely for purposes of subchapters I and II of the Act is further underscored by the fact that it provided a different, and more expansive, definition of child for purposes of subchapter III of the Act (the nationality and naturalization provisions). See 8 U.S.C. 1101(c)(1). Moreover, the importance of the definition of "child" contained in 8 U.S.C. 1101(b)(1) is underscored in 8 U.S.C. 1101(b)(2), which provides that "[t]he

In 1977, this Court had occasion to analyze in detail the definition of "child" in 8 U.S.C. 1101(b). *Fiallo* v. *Bell, supra*. In *Fiallo*, three sets of unwed natural fathers and their illegitimate children, all seeking special immigration preference status, challenged the constitutionality of the Act's definition of child. Under that definition (8 U.S.C. 1101(b)(1)(D)), an illegitimate child is considered the "child" of his natural mother but not of his natural father. The Court, in rejecting that challenge, explicitly recognized that the courts were not free to disregard Congress's definition of "child" in favor of their own. As the Court stated (430 U.S. at 797-798 (citation omitted; emphasis added)):

> [Defining an illegitimate child in relation to his or her natural mother but not his natural father] is just one of many [distinctions] drawn by Congress *pursuant to its determination to provide some—but not all—families with relief from various immigration restrictions* that would otherwise hinder reunification of the family in this country. In addition to the distinction at issue here, Congress has decided that children, whether legitimate or not, cannot qualify for preferential status if they are married or are over 21 years of age. 8 U.S.C. § 1101(b)(1). Legitimated children are ineligible for preferential status unless their legitimation occurred prior to their 18th birthday and at a time when they were in the legal custody of the legitimating parent or parents. § 1101(b)(1)(C). Adopted children are not entitled to preferential status unless they were adopted before the age of 14 and have thereafter lived in the custody of their adopting or adopted parents for at least two years,

terms 'parent', 'father', or 'mother' means a parent, father or mother *only* where the relationship exists by reason of any of the circumstances set forth in [the definition of child]" (emphasis added).

> § 1101(b)(1)(E). And stepchildren cannot qualify unless they were 18 at the time of the marriage creating the stepchild relationship. § 1101(b)(1)(B).
>
> *With respect to each of these legislative policy distinctions, it could be argued that the line should have been drawn at a different point and that the statutory definitions deny preferential status to parents and children who share strong family ties. But it is clear from our cases * * * that these are policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of Congress.*

The reasoning in *Fiallo* clearly applies in this case; the meaning of the term "child" for purposes of suspension of deportation is for Congress, not the courts, to define.

3. The carefully drafted definition of "child" in the Act reflects one aspect of the overall congressional purpose to provide relief from deportation only in the most exceptional cases. See S. Rep. 1137, 82d Cong., 2d Sess. 25 (1952); H.R. Rep. 1365, 82d Cong., 2d Sess. 62-63 (1952). This Court has recently made clear in two cases that the courts may not expand the narrow remedy of suspension of deportation established by Congress. In *INS* v. *Jong Ha Wang, supra*, the Court summarily reversed a lower court decision that had adopted an expansive definition of the term "extreme hardship" for purposes of Section 244(a)(1) of the Act, 8 U.S.C. 1254(a)(1). The Court indicated that the immigration authorities "have the authority to construe 'extreme hardship' narrowly should they deem it wise to do so. Such a narrow interpretation is consistent with the 'extreme hardship' language, which itself indicates the exceptional nature of the suspension remedy." 450 U.S. at 145. Similarly, in *INS* v. *Phinpathya, supra*, the Court, in interpreting the seven year continous physical presence requirement of Section

244(a)(1), 8 U.S.C. 1254(a)(1), rejected arguments that a liberal definition should apply. The Court analyzed the legislative history of Section 244(a)(1) at length (464 U.S. at 189-192), and concluded as follows (*id.* at 195-196 (emphasis added)):

> It is * * * clear that Congress intended strict threshold criteria to be met before the Attorney General could exercise his discretion to suspend deportation proceedings. Congress drafted § 244(a)(1)'s provisions specifically to restrict the opportunity for discretionary administrative action. Respondent's suggestion that we construe the Act to broaden the Attorney General's discretion is fundamentally inconsistent with this intent. * * * *Congress designs the immigration laws, and it is up to Congress to temper the laws' rigidity if it so desires.*

4. Despite this Court's decisions in *Fiallo*, *Jong Ha Wang* and *Phinpathya*, the court of appeals in this case reaffirmed its expansive definition of "child" for purposes of reviewing INS suspension of deportation decisions. The court ruled that the immigration judge and the BIA had erred in not considering whether respondent's nieces were her "children" (App., *infra*, 4a). It reached that decision, moreover, without even discussing the statutory definition of child (8 U.S.C. 1101(b)). The court specifically stated (App., *infra*, 5a) that *Tovar* remained "good law" despite this Court's intervening decisions in *Jong Ha Wang* and *Phinpathya*. Citing no authority, the court simply concluded that it had "greater discretion" in applying the "extreme hardship" requirement than it did in applying the continuous physical presence requirement involved in *Phinpathya* (*ibid.*). This reasoning is particularly unpersuasive since *Jong Ha Wang*, like this case, involved the "extreme hardship" issue. We submit that the court of appeals, both in the instant case and in *Tovar*,[7] improperly substituted its own more inclusive definition of "child" for that explicitly provided by Congress.

The Third Circuit is not the only circuit that has improperly expanded the definition of child. The First Circuit, in *Antoine-Dorcelli* v. *INS*, *supra*, relied on *Tovar* in holding that the BIA erred in not considering, for purposes of suspension of deportation, an alien's relationship with various non-relatives with whom she had been living. The court found *Tovar* persuasive and ruled that *Tovar* also applied to non-relatives. 703 F.2d at 22. Indeed, the court even left open the possibility that the alien could claim a parent-child relationship with children whose own parents lived at the premises as well. *Id.* at 20, 22 n.3.[8]

Other circuits, by contrast, have ruled that *Tovar* is contrary to this Court's pronouncements in *Jong Ha Wang* and *Phinpathya*. Thus, in *Contreras-Buenfil*, the Ninth Circuit rejected the alien's assertion that, under *Tovar*, the BIA had erred in failing to consider the hardship to his girlfriend's son. The Ninth Circuit reasoned that (712 F.2d at 403):

> *Tovar* preceded the Supreme Court's *Jong Ha Wang* decision, in which the Court stated that the court of appeals may not substitute its definition of

[7] In *Tovar*, the court held that a grandchild could be considered a child of his grandmother for purposes of 8 U.S.C. 1254(a)(1) because there was a de facto parent-child relationship between them. The court cited the statutory definition of child (see 612 F.2d at 797 n.3), but then proceeded to ignore it.

[8] The Second Circuit has also indicated, in a decision rendered prior to *Jong Ha Wang* and *Phinpathya*, that *Tovar*, on its facts, was probably correctly decided. *Chiaramonte* v. *INS*, 626 F.2d 1093 (1980). The alien had obtained extreme hardship consideration as to his married, self-supporting son, but the Second Circuit refused to extend *Tovar* to include the 56 year old alien's relationship with his father, reasoning that since the alien was not a "child" as defined in the Act, his father could not be deemed a "parent" (626 F.2d at 1100).

"hardship" for that of the Board. In light of *Jong Ha Wang*, it is unlikely that the Court would require the Board to consider hardship to a person not identified in the statute. Although the Board might have considered hardship to [the girlfriend's son], its refusal to go beyond the statutory definition of "child" is not an abuse of discretion.

Similarly, the Fifth Circuit, on rehearing, vacated the portion of a prior opinion that had remanded the case for a *Tovar* analysis. *Zamora-Garcia* v. *United States Dep't of Justice INS*, 737 F.2d 488, rev'g 724 F.2d 974 (5th Cir. 1984). The case raised the issue of whether an alien housekeeper could assert hardship to her employer's children. The court reasoned that this Court's intervening decision in *Phinpathya* required strict adherence to the statutory definition of "child." In the court's words (737 F.2d at 493-494 (citation omitted)):

> We concede that the plain language of the statute provides only for the consideration of extreme hardship "to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residency." On rehearing, we think our earlier liberal interpretation of the statute * * * is precluded by the Supreme Court's [*Phinpathya*] decision * * *.

This Court should resolve the conflict among the circuits and hold that the courts are restricted to compliance with the statutory terms when reviewing suspension of deportation decisions by INS.

5. The court of appeals' decision, although unpublished, will have a substantial adverse impact on the administration of the immigration laws. That decision makes clear that *Tovar*, a published decision, remains good law in the Third Circuit. As a result of *Tovar* and its progeny, including this case, immigration authorities must consider hardship to individuals outside the narrow categories

specified by Congress. They must also consider the difficult psychological issue of whether individuals have formed de facto parent-child relationships. Moreover, these decisions have impaired the efforts of the BIA and immigration judges to apply uniformly and evenhandedly the simple concept of "child," which Congress defined in great detail. In addition, the court's liberal construction of "child" frustrates Congress's clear intent to make suspension of deportation a remedy available only in narrowly defined circumstances. In short, *Tovar* and its progeny have led to the very type of open-ended litigation that Congress specifically sought to avoid when it enacted, to accompany the suspension of deportation provision, an elaborately detailed definition of the term "child."[9] Review by this Court is therefore needed.

---

[9] See generally INS v. *Rios-Pineda*, No. 83-2032 (May 13, 1985), slip op. 6 ("One illegally present in the United States who wishes to remain * * * has a substantial incentive to prolong litigation in order to delay physical deportation for as long as possible."); *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) (emphasis added) (noting that "a deportation hearing is intended to provide a *streamlined* determination of eligibility to remain in this country"). The extent of litigation produced by *Tovar* is evident from the number of published court of appeals decisions that have addressed, in varying degrees, the issues raised in that case. See Dill v. *INS*, 773 F.2d 25, 28, 31 (3d Cir. 1985); *Zamora-Garcia* v. *United States Dep't of Justice INS*, *supra*; *Contreras-Buenfil* v. *INS*, *supra*; *Amezquita-Soto* v. *INS*, 708 F.2d 898, 903 (3d Cir. 1983); *Antoine-Dorcelli* v. *INS*, *supra*; *Chiaramonte* v. *INS*, 626 F.2d 1093, 1100 (2d Cir. 1980).

CONCLUSION

The petition for a writ of certiorari should be granted. In light of the clarity of the statutory definition and the governing legal principles already announced in this Court's decisions, the Court may wish to consider summary reversal.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ROBERT H. KLONOFF
Assistant to the Solicitor General

EILEEN A. CARTY
ALISON R. DRUCKER
Attorneys

JULY 1986

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85-3113

VIRGINIA HECTOR, PETITIONER

v.

IMMIGRATION & NATURALIZATION SERVICES [*sic*], RESPONDENT

Petition for Review
Board of Immigration Appeals
(Virgin Islands)

Argued December 2, 1985

Opinion filed December 20, 1985

OPINION OF THE COURT

Before: HUNTER, GARTH, AND BECKER, *Circuit Judges*

HUNTER, Circuit Judge:

1. Virginia Hector is a forty-year old native and citizen of Dominica, West Indies. She entered the United States on April 24, 1975 as a nonimmigrant visitor for pleasure and has resided in the United States since then without interruption even though she was only authorized to remain until April 30, 1975. Hector is unmarried and the mother of four children. Three of her children, Catherine, aged twenty-two, Beverly, aged sixteen, and Joey, aged fifteen, are natives and citizens of Dominica and reside there with

Hector's parents. Her youngest child, Gregg, aged eight, is a United States citizen and lives with Hector. Gregg's father resides in Dominica. Two of Hector's nieces, aged nine and ten, are United States citizens and have lived with Hector for the past two years. The children, whose parents remain in Dominica, came to stay with Hector in order to attend schools better than those in Dominica. Most of Hector's other relatives remain in Dominica. Hector is presently employed as a sales clerk and receives food stamps for her son, Gregg. When she was in Dominica she worked as a housecleaner for twelve dollars a week.

2. The Immigration and Naturalization Service ("INS") commenced deportation proceedings against Hector on July 13, 1982 with an order to show cause charging her with deportability under § 241(a)(2) of the Immigration and Naturalization Act ("Act"), 8 U.S.C. § 1251(a)(2). Hector conceded that she was deportable but at her hearing on November 30, 1983 she requested a suspension of deportation under § 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1). The immigration judge agreed that Hector met the first two requirements for a suspension of deportation. She had been physically present in the United States for seven years before her application and she was of good moral character. However, the judge said that she had not shown that her deportation would "result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1254(a)(1). The judge determined that neither Hector nor her son would suffer "extreme hardship" if she were deported. The judge, stating that the statute's reference to an alien "child" could not include Hector's nieces, would not consider whether the nieces would suffer "extreme hardship" if Hector were deported. The judge found Hector ineligible for a suspension of deportation and granted her a voluntary departure within three months with an

alternative order of deportation to Dominica if she did not depart. The Board of Immigration Appeals ("BIA") affirmed the immigration judge's decision on December 26, 1984.

3. In this petition for review, Hector contends that the immigration judge's decision was not supported by reasonable, substantial, and probative evidence. Furthermore, she claims that the judge abused his discretion by refusing to consider evidence concerning the hardship that Hector's nieces would suffer if Hector were deported. The Supreme Court has held that "extreme hardship" must be narrowly construed. *See INS* v. *Jong Ha Wang,* 450 U.S. 139, 145 (1981). Therefore the decisions of the immigration judge and BIA may be overturned only if they are arbitrary, irrational, or contrary to law. *See So Chun Chung* v. *United States,* 602 F.2d 608, 611-12 (3d Cir. 1979).

4. The immigration judge and the BIA correctly held that Hector had not made a sufficient showing that she would suffer hardship if she were deported. Although an inability to engage in any profession constitutes hardship, *see Kasravi* v. *INS,* 400 F.2d 675 (9th Cir. 1968), Hector, who is young, in good health, and worked as a housecleaner when she was in Dominica, made no such showing. Economic detriment or a reduced standard of living are factors that should be considered, but do not, standing alone, prove "extreme hardship." *See Bueno-Carrillo* v. *Landon,* 682 F.2d 143 (7th Cir. 1982). Hector has also not made a sufficient showing of hardship to her son if she is deported. Mere inconvenience to a child is not sufficient to meet the "extreme hardship" requirement. *See Banks* v. *INS,* 594 F.2d 760, 762 (9th Cir. 1979).

5. Hector contends that hardship to her nieces should have been considered because "child" in 8 U.S.C. § 1254(a)(1) does not refer only to biological children. *See Tovar* v. *INS,* 612 F.2d 794 (3d Cir. 1980). In *Tovar,* this court found that a child who had been raised from infancy by his grandmother viewed his grandmother as his mother

and that, under those circumstances, the grandmother and grandson had a relationship that "so closely resembled that of parent to child," that § 1254(a)(1) applied to the situation. 612 F.2d at 797. The child in the *Tovar* case was emotionally attached to and financially dependent on his grandmother. In this case before us, Hector's nieces had lived with her not from infancy but for only one year at the time of the hearing. Their parents are alive and living in Dominica and the immigration judge believed that the relationship between Hector and her nieces was "not so emotionally intense nor of such longstanding duration as to supplant the childrens' relation with their parents." Nevertheless, the immigration judge erred by refusing even to hear testimony that could have shown that, despite the short time Hector and her nieces had lived together, a relationship of mother and child did exist. The BIA must consider all facts in making a determination of whether or not there would be extreme hardship. *See Zavala-Bonilla* v. *INS,* 730 F.2d 562 (9th Cir. 1984); *Amezquita-Soto* v. *INS,* 708 F.2d 898 (3d Cir. 1983). The BIA could have held that the nieces did not fit the statutory definition of "child" and held, in the alternative, that even after a full consideration of hardship to the nieces, there was no "extreme hardship." *See Amezquita-Soto v. INS,* 708 F.2d 898 (3d Cir. 1983). In this instant case, however, the BIA held that the nieces were not included in the statute and then summarily stated that there was no showing of "extreme hardship." The Board must address meaningfully each factor relevant to the determination of hardship. *See Ramos* v. *INS,* 695 F.2d 181 (9th Cir. 1983).

6. This court's decision in *Tovar* has been questioned by other courts since the Supreme Court's 1981 decision in *Jong Ha Wang, see Contreras-Buenfil* v. *INS,* 712 F.2d 401 (9th Cir. 1983), and the Supreme Court's 1984 decision in *INS* v. *Phinpathya,* 464 U.S. 183 (1984). *See Zamora-Garcia* v. *United States Department of Justice INS,* 737 F.2d 488 (5th Cir. 1984). The Supreme Court stated in *Jong Ha Wang* that "extreme hardship" could be interpreted narrowly and courts were not to substitute their own definition of hardship for that of the Board. In *Phinpathya,* the Court held that the requirement of seven years continuous presence was to be interpreted according to its plain meaning. The Fifth Circuit in *Zamora-Garcia* stated that *Tovar* had been so undercut by *Phinpathya* that it believed the BIA was not obligated to consider the hardship to children in the care of, but not related to, the deportable alien. Although *Phinpathya* and *Jong Ha Wang* indicate that the statute is to be narrowly construed, we believe that *Tovar* is still good law. Although the "extreme hardship" provision that includes the reference to "child" is to be construed narrowly, *see INS* v. *Jong Ha Wang,* 450 U.S. 139, 145 (1981), the statute permits the courts greater discretion in interpreting § 1254(a)(1) than that permitted under the provision requiring seven years of continuous presence considered in *Phinpathya.*

7. It is important that Hector at least be given an opportunity to present evidence of hardship to her nieces, since a court must determine hardship based upon a consideration of the deportation's combined effect on the entire protected class (those persons named in § 1254(a)(1)). *See Barrera-Leyva* v. *INS,* 637 F.2d 640 (9th Cir. 1980); *Villena* v. *INS,* 622 F.2d 1352 (9th Cir. 1980). Even if no factor would constitute "extreme hardship" if considered in isolation, a court must consider whether hardship exists when the factors are viewed in the aggregate. *See Ramos* v. *INS,* 695 F.2d 181 (9th Cir. 1983).

8. For the foregoing reasons we will grant the petition for review of the decision of the BIA and remand for further consideration consistent with this court's holding in *Tovar* v. *INS,* 612 F.2d 794 (3d Cir. 1980), and *Amezquita-Soto* v. *INS,* 700 F.2d 898 (3d Cir. 1983).[1]

---

[1] Judge Garth would deny Hector's petition for a writ of review. In his opinion, the BIA adequately considered the relationship between the two resident nieces and Hector, and any hardship to Hector or the nieces themselves which might result from Hector's deportation. The BIA correctly determined that such hardship, if any, did not rise to the level of extreme hardship meriting suspension of deportation.

TO THE CLERK:

Please file the foregoing opinion.

JAMES HUNTER, III, *Circuit Judge*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3113

VIRGINIA HECTOR, PETITIONER

v.

IMMIGRATION & NATURALIZATION SERVICES [*sic*],
RESPONDENT

On Petition for Review
Board of Immigration Appeals (Virgin Islands)

JUDGMENT

Present: HUNTER, GARTH, AND BECKER, *Circuit Judges*

This cause came on to be heard on the record from the Board of Immigration Appeals of the Immigration and Naturalization Service and was argued by counsel December 2, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the petition be granted and the cause be remanded to the said Board for further consideration consistent with this Court's holdings in *Tovar* v. *INS*, 612 F.2d 794 (3rd Cir. 1980), and *Amezquita-Soto* v. *INS*, 700 F.2d 898 (3rd Cir. 1983).

ATTEST:
/s/ SALLY MRVOS
Clerk

December 20, 1985

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3113

VIRGINIA HECTOR, PETITIONER

v.

IMMIGRATION & NATURALIZATION SERVICES [*sic*],
RESPONDENT

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges*

The petition for rehearing filed by

RESPONDENT

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
JAMES HUNTER
Judge

Dated: February 10, 1986

APPENDIX D

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA 22041

File: A23 457 816—St. Thomas, V.I.

In re: VIRGINIA HECTOR

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
David Iverson, Esquire
POB 8329
St. Thomas, U.S.
Virgin Islands 00801

ON BEHALF OF SERVICE:
Victor Fuste
General Attorney

CHARGE:
Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)]-Nonimmigrant—remained longer than permitted

APPLICATION: Suspension of deportation

In a decision dated November 30, 1983, the immigration judge found the respondent deportable as charged, denied her application for suspension of deportation, and granted her voluntary departure. The respondent has appealed from that decision. The appeal will be dismissed.

The respondent is a 40-year-old native and citizen of Dominica who entered the United States in 1975 as a nonimmigrant visitor for pleasure. She has remained in this country since her entry. She is single and is the mother of four children. The three oldest children, aged 21 years, 15

years, and 14 years, are natives and citizens of Dominica who live in that country. The youngest child, aged 8 years, is a United States citizen by birth and resides in this country with the respondent. Two of the respondent's nieces, who are United States citizens, also live with the respondent. These children, 9 years old and 10 years old, resided for approximately 6 years in Dominica with their parents, who remain in that country, before returning to the United States approximately 2 years ago in order to attend school. The respondent is employed in the United States as a sales-clerk. Her other family members in Dominica include her parents and two siblings.

In order to establish eligibility for suspension of deportation, an alien must show that he has been physically present in the United States for 7 years preceding the date of his application for such relief, that he has been a person of good moral character for the same period, and that his deportation will result in extreme hardship to himself or to his United States citizen or permanent resident spouse, children, or parents. Section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(1). The immigration judge found that the respondent satisfied the good moral character and continuous physical presence requirements but that she failed to establish that she or her citizen child would suffer extreme hardship if they returned to Dominica.

"Extreme hardship" is not an easily definable term of fixed and inflexible content or meaning but, rather, depends upon the facts and circumstances of each particular case. *See Matter of Uy*, 11 I&N Dec. 159 (BIA 1965); *Matter of Hwang*, 10 I&N Dec. 448 (BIA 1964). Moreover, the United States Supreme Court has stated that a narrow interpretation is consistent with the extreme hardship language, which itself indicates the exceptional nature of the suspension remedy. *INS* v. *Wang*, 450 U.S. 139 (1981).

In determining whether or not such hardship exists, all relevant factors must be considered, including the health of the alien and of his family; his family ties in the United States and abroad; his length of residence in the United States; the economic and political conditions in the country to which the alien is returnable; the financial status of the alien, including his business and occupation; the possibility of other means of adjustment of status; and his immigration history. *See Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978).

On appeal the respondent cites the decision of the United States Court of Appeal for the Third Circuit in *Tovar* v. *INS*, 612 F.2d 794 (3d Cir. 1980) and contends that difficulties encountered upon her deportation by her United States citizen nieces can be considered in an assessment of extreme hardship in her case. In this regard, she maintains that it was error for the immigration judge to preclude her testimony concerning the hardships that these children would endure if the respondent returns to her native country and requests that the record be remanded to the immigration judge for testimony on this issue. She further asserts that the immigration judge improperly failed to consider the hardship which she may suffer on account of the difficulties imposed on her nieces due to her departure. The respondent also contends that the immigration judge failed to give full consideration to the hardship faced by her United States citizen child as a result of her return to Dominica.

Based upon our review of the record, we conclude that the respondent has not demonstrated extreme hardship within the meaning of section 244(a)(1) of the Act. Although the respondent may experience financial hardship and a reduced standard of living in Dominica, such economic detriment, even when combined with the birth of a United States citizen child, does not constitute extreme hardship in the absence of substantial additional

equities. *See Choe* v. *INS*, 597 F.2d 168 (9th Cir. 1979); *Davidson* v. *INS*, 558 F.2d 1361 (9th Cir. 1977); *Matter of Kim*, 15 I&N Dec. 88 (BIA 1974). The respondent has not demonstrated that such equities exist in her case. She is of employable age and in good health. It is not apparent that she could not provide for her family's needs in Dominica. Her readjustment to life in Dominica and emotional distress due to her separation from friends and relatives in this country, including her nieces should they remain here, are not hardships which can be considered extreme. *See Matter of Uy, supra*. Moreover, her return to Dominica would reunite her with her parents, siblings and children who reside in that country, and it is possible that these family members could help the respondent in her readjustment. The emotional hardship to the respondent due to difficulties encountered by her nieces as a result of her deportation also does not constitute extreme hardship even when combined with the other factors in her case.

It is also not demonstrated that the hardship encountered by the respondent's citizen child if he accompanies his mother to Dominica rise to a level which can be considered extreme.[1] It has been held that the return of citizen children with their parents to a country with a lower standard of living, which also results in diminished educational opportunities, does not in itself require a finding of extreme hardship. *See Davidson* v. *INS, supra; Matter of Kim, supra*. The child is young and in good

[1] Although the respondent indicates that the citizen child may remain in this country without her, the evidence submitted does not suggest that the child will be separated from his mother. Moreover, difficulties encountered by the child, should he remain in this country without the respondent, are by implication a lesser hardship in the respondent's eyes than the hardship which the child may face in his mother's native country and do not rise to the level of extreme hardship.

health. No evidence was submitted to show that he could not successfully adapt to life in his mother's native country and it has not been established that his separation from family and friends in the United States constitute an extreme hardship, even when combined with the other allegations in the respondent's case.

We also conclude that it was not error, in an assessment of extreme hardship, for the immigration judge to circumscribe the respondent's testimony concerning the hardships which her nieces may encounter if she returns to Dominica. The statute does not specifically denominate nieces among those family members whose hardships, if extreme, would permit suspension of deportation. We also find that the decision of the United States Court of Appeals for the Third Circuit in *Tovar* v. *INS, supra*, does not require a different result in this case. In *Tovar* v. *INS, supra*, it was held that the alien's relationship, as grandparent, to her United States citizen grandchild so closely resembled that of parent to child such that consideration of the hardship to the child was therefore relevant in an assessment of extreme hardship. The record in that case reflects that the citizen child was raised since infancy by his grandmother when his own parents rejected him and that he viewed his grandmother as his biological parent. In contrast, the respondent's nieces lived for most of their formative years in Dominica with their own parents, who continue to reside there, and that they only recently arrived in this country to live with their aunt while they attend school here. The respondent's association with her nieces is therefore not so emotionally intense nor of such longstanding duration so as to supplant the children's relation with their parents. Furthermore, assuming, arguendo, that the effect of the respondent's deportation on these children could be considered, we conclude that the hardships encountered by these children do not constitute extreme hardship even when combined with the other al-

legations in the respondent's case. Because the children's closest ties are with their parents, separation from their aunt if they remain in this country without her does not rise to the level of extreme hardship. Difficulties encountered by the children should they return to Dominica as a result of their aunt's departure also do not establish extreme hardship. Their return to that country will reunite them with their parents and, moreover, it is well-established that loss of material advantages and of educational opportunities available to them in the United States does not constitute extreme hardship. *See Davidson* v. *INS, supra.*

Considering together all of the hardships to the respondent, her citizen child and even to her citizen nieces, if she departs from the United States, we find that she has failed to establish extreme hardship within the meaning of section 244(a)(1) of the Act. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

/s/ MARY MAGUIRE DUNNE
Acting Chairman

APPENDIX E

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

November 30, 1983
File: A23 457 816
Saint Thomas, Virgin Island

In the Matter of:
VIRGINIA HECTOR
Applicant.

TRANSCRIPT OF PROCEEDING
DEPORTATION PROCEEDINGS

FILE: A23 457 816

CHARGE:
Immigration Nationality Section 241(a)(2), U.S. Code 1251(a)(2), remained in the United States longer than permitted.

APPLICATION:
Immigration Nationality at Section 244(a)(1), U.S. Code 1254(a)(1), Suspension of Deportation, Return of Application, Immigration Nationality at Section 244(e), U.S. Code 1254(a), Voluntary Departure.

On Behalf of the Applicant:
Barbara Twine, Esquire
Legal Services of the
Virgin Islands
15-16 Kongens
Gotta, Saint Thomas
Telephone: 774-6720

On Behalf of the Service:
Victor Fuste, Esquire
Trial Attorney
San Juan, Puerto Rico

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent is a 39-year old, native and citizen of Dominica who last arrived in the United States, April 24, 1975. At that time, she was admitted as a visitor for pleasure, authorized to remain in the United States until April 30, 1975.

Through Counsel, the Respondent has conceited [*sic*] that she has remained in the United States for a longer period of time, than permitted. And, has requested—correction—longer time, than permitted. Respondent has requested and involved in an order of deportation, that she be granted relief under the provision of Section 244(a)(1), Suspension of Deportation. Or, in the alternative, voluntary departure.

The country of Dominica has been designated as the country of deportation, should deportation become necessary.

A discussion as to eligibility for Suspension of Deportation. In order to be eligible for the relief of Suspension of Deportation, the Respondent must establish three statutory prerequisites. Continuous physical presence in the United States, good moral character, and she must establish that either she or other persons enumerated in Section 244(a)(1) would suffer extreme hardship, were she to be removed from the United States.

In this case, the Government has conceited [*sic*] and I find that the Respondent has been physically present, in the United States, for the seven years required, for eligibility under the act. And, also that she is a person of good moral character.

The sole remaining issue, is whether or not she has established that she or her child would suffer extreme hardship, were she to be removed from the United States.

Counsel argues that the hardship should be extended to her nieces, of whom she has been taking care of, for approximately the last year and a half. Who are citizens of the United States, recorded.

Commentary during the course of the proceeding advised Counsel that, the Court would not extend the hardship issue to the nieces and will not in this opinion, make any findings in that regard.

Extreme hardship is not an easily defined term of fixed or flexible content to meaning. But, rather depends upon the facts and circumstances of each case. The age of the Respondent, her health, her families ties in the United States and abroad, economic conditions in the country to which Respondent is returnable, economic status in this community, community involvement and activities, contributions to the community, past immigration history, are all factures [*sic*] which must be considered in determining whether or not the Respondent has met the burden of establishing the hardship issue.

The Respondnet [*sic*] in this case has been in the United States approximately eight years. Date of issuance of the Order to Show Cause, she was in the United States, slightly more than seven years. She is a young woman, her family in good health and she has one citizen child, born in the United States.

The father of that child, is living in Dominica. At the Respondent's last communication with him. And, she has living in the United States no relatives, at the present time. All her brothers and sisters, together with her mother and father, are living in Dominica. She also has three children living in Dominica.

On this record, the Respondent's ties appear to be stronger in Dominica, then [*sic*] they are here, in the United States. The issue of hardship, relates to the hardship that the child, who would suffer, were she to be removed from the United States, with her mother, to Dominica.

It has been argued that the educational opportunities in Dominica are not equivalent to the educational opportunities here, in the United States. And, as a consequence, this hardship, together with the financial hardship to be

suffered by the Respondent, would constitute extreme hardship the Respondent would suffer, if removed from the United States, at this time.

By the Respondent's own testimony, in this proceeding, she indicated that some students succeed in Dominica and others don't[;] it depends on how much they are pushed. They are not pushed, in the Dominica School System, according to her testimony, as they are here by the teachers. Apparently, the teachers do not take, according to the Respondent, an active interest in the development of the students, in Dominica. This is a subjective commentary by the Respondent, not supported by any evidence for the record.

The evidence offered to support the fact that education in Dominica is inferrer [*sic*] to the education here in the United States, is the apparent lack of success of the two nieces, who have come to live with the Respondent in the last year and a half and gone to school here.

According to the Respondent's testimony, the teachers here have indicated that the two nieces apparently have received little education, in Dominica, because they are not succeeding well, at all, here in the United States.

It is left to surmise, to determine, what if any education has been offered to these children, prior to their coming to the United States. And, if the Dominican School System is at fault. The Court cannot draw such conclusions. Accordingly, the issue of lack of educational opportunity in Dominica, as opposed to the United States, has not been settled, on the record, by evidence that there is not such a finding and I cannot make such a finding, on this record.

Certainly, there would be some hardship for a child being removed from the United States and living in a country of his own. However, the Court does not believe that, that hardship constitutes the extreme hardship that is contemplated by the Congress and enacted in legislation, under Section 244(a)(1).

The Respondent is a young woman, healthly [*sic*] and capable of maintaining herself. She has all her family ties and can look for them for support, both emotionally and substiutionally [*sic*] with regard to her relocation, in Dominica.

The Court believes that the application, (inaudible) the Respondent has not carried her burden in establishing extreme hardship, either to herself or her citizen child.

The argument that the Respondent has a parental relationship with the two children is without precedent and the Court has—cannot—find any such fixed relationship existing. Even, assuming arguendo, that such precedent exists, the fact that the Respondent has resided with these two children, for only a year and a half and it's difficult to find that it's a year and a half, that the children would have replaced their mother and father, with the Respondent.

Accordingly, the application will be denied as a matter of this—will be denied—both on failure to establish the extreme hardship issue, to the satisfaction of the Court. And, also, the Court does not believe, as a matter of discretion, that the application is warranted, at this time.

ORDER:

IT IS ORDERED that the Application for Suspension of Deportation be and the same is hereby denied.

AND IT IS FURTHER ORDERED that the law order deportation, and the Respondent be granted voluntary departure, without expense, to the Government, on or before April, correction, March 1, 1984, or any extension that may be granted by the Immigration Service. In the event the Respondent fails to depart, when and as required, Respondent be ordered by the Court, without further hearing, to Dominica, on the charges contained in the Order to Show Cause.

/s/ FRANCIS M. MAIOLO
Immigration Judge

☆ U.S. GOVERNMENT PRINTING OFFICE: 1986—491-507/20251

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

SUPREME COURT OF THE UNITED STATES

IMMIGRATION & NATURALIZATION SERVICE, Petitioner	
vs	NO. 86-21
VIRGINIA HECTOR, Respondent	

(3)

MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

COMES NOW Respondent to move this Court for leave to appeal informa pauperis for the reasons set forth in the accompanying affidavit.

DATED: 8/20/86

DAVID IVERSON, ESQUIRE
Attorney for Respondent
P.O. Box 8329
St. Thomas, U.S.V.I. 00801
(809) 776-1616

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and exact copy of the foregoing MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS, AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS and CONSENT to be mailed postage prepaid to Charles Fried, Esq. at U.S. Department of Justice, Washington, D.C. 20530 this 22nd day of August, 1986.

Claire Fortune

15pp

AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE
TO APPEAL IN FORMA PAUPERIS

SUPREME COURT OF THE UNITED STATES

IMMIGRATION & NATURALIZATION SERVICE,	)	
Petitioner	)	NO. 86-21
vs	)	
VIRGINIA HECTOR,	)	
Respondent	)	

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL
IN FORMA PAUPERIS

I, VIRGINIA HECTOR, being first duly sworn, depose and say that I am the respondent in the above-entitled case, that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following: respond to petitioner's Petition for Writ of Certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you employed?

   a) Yes, at "Artland" Main Street, St. Thomas, U.S. Virgin Islands

      Salary: $95.00 per week

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   a) No

3. Do you own any cash or checking or savings account?

   a) I have savings of $350

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   a) No

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   a) Greg Hector age 10 - son

   b) Charmaine Hector age 13 - niece

   c) Kathleen Hector age 12 - niece

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Virginia Hector
VIRGINIA HECTOR

SUBSCRIBED and SWORN to before me this 21st day of August, 1986.

NOTARY PUBLIC

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

SUPREME COURT JUSTICE

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

No. 86-21

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER
v.
VIRGINIA HECTOR, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LAWRENCE H. RUDNICK
ORLOW, FULLER, RUBIN & STEEL
Attorney

DAVID IVERSON
Attorney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

No. 86-21

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER
v.
VIRGINIA HECTOR, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT

Virginia Hector is a native and citizen of Dominica, West Indies who entered the United States April 24, 1975 and has maintained continuous physical presence in the United States since that date. She resides with her youngest child, eight years old, who is a United States citizen, as well as two of her neices, ages nine and ten, who are also United States citizens. The nieces have lived with Hector for more than two years. Her neices live with her because their parents remain in Dominica.

Hector petitioned for review to the United States Court of Appeals from the Third Circuit from a decision of the Board of Immigration Appeals (BIA) which affirmed an Immigration Judge's decision finding her deportable and not eligible for relief from deportation pursuant to §244(a)(1) of the Immigration and Nationality Act, 8 USC §1254(a)(1). The Immigration Judge refused to consider hardship to Mrs. Hector's neices. The BIA found the Third Circuit's decision in Tovar v. INS, 612 F. 2d 794 (1980) to be distinguishable on the facts. The BIA held that Mrs. Hector's relationship to her neices was not so emotionally intense nor of sufficient duration to supplant the relationship of the children to their natural parents. Further, even considering the potential hardship to the neices, the BIA found insufficient hardship.

The Court of Appeals remanded for further consideration of the hardship to the neices because it found that the Board had not meaningfully considered hardship to the neices and that the Board's analysis of that issue was conclusory. The Court considered contrary law of other Circuits as well as this Court's decision in INS v. Jong Ha Wong, 450 US 139 (1981) and INS v. Phinpathya, 464 US 183 (1984). The Court found greater discretion had been left to the courts on the hardship issue than on the question of "continuous physical presence" considered in INS v. Phinpathya. The Court therefore reaffirmed its Tovar decision. For these reasons the Court granted the petition and remanded to the Board for further consideration.

After taking more than six months to decide whether to file a petition for certiorari the Justice Department has filed a Petition for Certiorari asserting that the case presents,"...an important and recuring question of immigration law..." Petition for Certiorari, pg.9. For the reasons which follow, it is respectfully submitted that no such issue is presented by this case.

REASONS FOR DENYING PETITION

The Government argues that the Court of Appeals construction of the statute presents substantial administrative burdens to the Immigration and Naturalization Service. Despite

having complete access to the records of agencies within the Department of Justice, the Immigration and Naturalization Service, as well as the Executive Office for Immigration Review (containing the BIA) the Solicitor General presents absolutely no statistics or other evidence to support this assertion. The only support for this assertion is citation to five judicial decisions concerning the issue. Petition for Certiorari, pg. 19 n. 19. The apparent inference to be taken is that there are many other such cases in existence. This invitation to infer should not be accepted by the Court.

The grant of a petition for certiorari is reserved for "special and important reasons" under Supreme Court Rule 17. This case does not present special and important reasons for this Court to utilize its valuable time in considering the issue. Rather, the case presents an arcane and probably unimportant issue in all but a very small and narrow class of cases.

Suspension of deportation is afforded to aliens who merit a favorable exercise of the Attorney's discretion and who meet the statutory prerequisites of seven years of continuous physical presence, good moral character, and who in the opinion of the Attorney General would suffer extreme hardship if deported. The extreme hardship requirement can be satisfied by demonstrating hardship to the applicant themselves and/or their United States citizen or permanent resident spouse, parent, or child. §244(a)(1) of the Immigration & Nationality Act, 8 USC §1254(a)(1).

The Government's brief entirely overlooks the provision

in §244(a)(1) of the Act, 8 USC §1254(a)(1), which permits extreme hardship to the applicant to be considered. The Government argues as if hardship must be established to a citizen or permanent resident child. Such is not the case. Compare 8 USC §1254(a)(1) with 8 USC §1182(e) wherein exceptional hardship must be shown to a citizen or permanent resident spouse or child. Thus, even if hardship to Mrs. Hector's neices ought not be considered separately, hardship to her neices, with whom she plainly has a close relationship, would also inflict hardship upon herself.

If the Court of Appeals erred, and we submit below that they did not, in requiring the BIA to consider hardship to her neices, the error is plainly harmless. The Board must carefully consider each factor which bears upon hardship to Mrs. Hector. Certainly, one of those factors would be separation from her neices with whom she had maintained a close relationship. To distinguish between that hardship and separate hardship to the neices is difficult at best. Accordingly, any error committed by the Court of Appeals is harmless. This Court can uphold a decision of a Court of Appeals on a basis other than that set forth by the Court of Appeals itself. Certainly, the Court may decline a petition for certiorari where the Court of Appeals decision is correct, albeit for another reason.

Further overlooked in the government's petition is the limited nature of the remedy imposed by the Court of Appeals and the narrow class of cases involved. First, the Court of Appeals merely remanded this matter to the Board of Immigration Appeals

for further consideration of hardship to the neices. The Government seems to assume that a full blown trial on the issue will thus be necessitated. Under the law of the Third Circuit, such is not the case. In Amezquita-Soto v. INS, 706 F. 2d 898 (3rd Cir. 1983) the Court made it plain that all the Board had to do was consider the hardship to the de facto child in more than a summary fashion. It is highly unlikely that the result of such an analysis on remand would be different in this matter. The Court of Appeals decision upheld the Board in all other respects and it would certainly appear that the reasoning of the BIA with respect to the lack of hardship would apply even with careful consideration of hardship to the neices.

Moreover, the Government would lead the Court to believe that a full blown trial will be required each and every time an alien alleges a de facto relationship. Both the Board and the Immigration Judge retain broad discretion to exclude testimony which is not material. Therefore, an Immigration Judge remains fee to require a strong prima facie showing that a familial type relationship, as set forth in Tovar, is present. The facts of Tovar and those of Antoine-Dorcelli v. INS, 703 F. 2d 19 (1st Cir. 1983) surely indicate that these will be rare circumstances indeed.

The Government argues that the legislative history of the 1952 Immigration and Nationality Act as well as its subsequent amendments requires a determination that the Court of Appeals has improperly expanded the scope of the suspension

remedy. Petition for Certiorari, pp. 11-15. The Respondent readily concedes that Congress has provided a detailed definitional scheme to apply generally to visa issuance. The government cites no specific legislative history pointing to the precise and narrow application of the definition of child in §101(b)(1) to the suspension statute. Rather, the government can only point to generalized statements about uniform application of definitions.

The government's argument has superficial appeal. However, it requires the court to make the specific application of the definitional section to §244 and find that relationships like those described by Congress would not be sufficient. It is one thing to say that in the normal visa issuance procedure, see §202 and §203 of the Immigration Act, entitlements will be limited to those precisely identified by Congress, and it is another to say that Congress intended that only those specified could be considered pursuant to a remedial statute.

In 1962 by Pub. L. 87-885 Congress significantly altered the suspension statute and greatly liberalized the remedy. The 1962 amended statute remains largely in effect today. In 1962, Congress substituted the term "extreme hardship" for the previously more restrictive "exceptional and extremely unusual hardship" for applicants in Mrs. Hector's . In doing so, Congress acted to ameliorate the severity of the suspension remedy as enacted in 1952. In doing so, Congress evinced its intention that suspension of deportation be available as a remedy against the uniform application of the

immigration laws. Suspension of deportation, is by its own terms, the exception to the uniform application of the immigration laws. It would be anomalous to adopt the Government's view that the definitional section in §101(b)(1) must be applied uniformally to a remedial provision designed to ameloriate the hardships of a uniform application of the immigration laws.

This Court has held that where Congress has spoken with precision in setting forth the eligibility requirement of "continuous physical presence of seven years" a court may not expand the remedy beyond the specific limitations set by Congress. INS v. Phinpathya, 464 US 183 (1984). Also, where Congress has expressly delegated the construction of a statutory term to the administering agency, as with the extreme hardship provision, the definition of the term, in the first instance, is for the agency and may not be overturned because a court would prefer another construction. INS v. Wang, 450 US 139 (1981). The Government argues that these two principles coalesce to mandate the grant of this petition and reversal of the Court of Appeals' judgement.

It is submitted that the government overlooks the general remedial nature of the suspension remedy. The above are exceptions to the rule of statutory construction that a remedial statute be liberally construed.

Following this precept, the Court of Appeals in Tovar v. INS, 612 F.2d 794, 797 (1980), found in the language of the

suspension provision a legislative intent to protect immediate family members of the aliens family from the hardship of deportation. Because the relationship in Tovar was found to be so close to that of a parent and child, the Court found the Immigration Service had to consider hardship to the grandchild on remand.

Neither Wang nor Phinpathya requires a different result. Wang involved a Motion to Reopen deportation proceedings. The Court of Appeals' error in Wang was two fold. First, the Court relieved the alien of complying with the specific requirement of the regulations in order to reopen deportation proceedings. Secondly, the Court overturned the Agency's construction of the term "extreme hardship" and substituted definition. In Phinpathya, the Court of Appeals found an exception to the seven year physical presence requirement not readily found in the specific words of the statute.

In Tovar, the Court of Appeals neither ignored specific language, nor encroached upon the agency in an area specifically delegated to it. The Court merely found that the agency should consider hardship to individuals whom the alien has a relationship which is substantively the same as the relationships identified by Congress. In doing so, the court neither ignored the specific words of Congress, or encroached unduly on the authority of the agency. The court merely interpreted the intention of Congress with regard to whom should be considered in

making the hardship determination. Unlike the Wang court, the Tovar court did not tell not tell the agency what the result must be, nor did it redefine the term "hardship".

The government submits there is a split in the Circuits on this issue. On close examination, no such split is present. In addition to Tovar, the First Circuit in Antoine-Dorcelli v. INS, 703 F.2d 19 (1983), has found that relationships substantively like those set forth in the Act have to be considered by the agency. See also Chiara monte v. INS, 626 F.2d 1093, 1100 (2nd Cir. 1980).

Two courts of appeals have reluctantly taken a different position since the decisions in Jon Ha Wang and Phinpathya. In Contreras-Buenfil v. INS 712 F.2d 401 (9th Cir. 1983) and in Zamora-Garcia v. United States Dept. of Justice INS, 737 F.2d 488 (5th Cir. 1984) both courts believed themselves to be bound by Supreme Court precedent to hold that Tovar was no longer "good law". It is respectfully submitted that these Courts have given Wang and Phinpathya an overly broad reading and taken them out of their specific context. The government points to not a single court of appeals decision which has taken the contrary position to that of Tovar without stating that it was bound to do so by its reading of Supreme Court precedent.

CONCLUSION

The petition for Writ of Certiorari should be denied. The issue posed is not sufficiently important to be considered by the Court. The Court of Appeals error, if there was any, was

harmless. Lastly, the decision of the Court of Appeals was correct.

Respectfully submitted,

LAWRENCE H. RUDNICK
Attorney for Respondent

ORLOW, FULLER, RUBIN & STEEL
936 Public Ledger Building
Sixth and Chestnut Streets
Philadelphia PA 19106
(215) 922-1181
9-10-86-aw:rj

No. 86-21

In the Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

VIRGINIA HECTOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE IMMIGRATION AND NATURALIZATION SERVICE

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-21

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

VIRGINIA HECTOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE IMMIGRATION AND NATURALIZATION SERVICE

---

1. Respondent does not seriously dispute the existence of a conflict in the circuits on the issue presented in this case: whether an alien may demonstrate extreme hardship to "his * * * child" for purposes of obtaining a suspension of deportation under the Immigration and Nationality Act (the Act), 8 U.S.C. 1254(a)(1), by showing hardship to persons who do not fall within the statutory definition of "child" (8 U.S.C. 1101(b)(1)). As respondent acknowledges (BR. in Opp. 9), the Third Circuit's ruling in the present case, which is consistent with the approach of the First Circuit, differs from the approach taken by the Fifth and Ninth Circuits. Respondent tries to minimize the inter-circuit conflict by pointing out (*ibid.*) that it stems not from a dispute over statutory construction but rather from a disagreement over the interpretation of this Court's decisions in *INS* v. *Jong Ha Wang*, 450 U.S. 139 (1981), and *INS* v. *Phinpathya*, 464 U.S. 183 (1984). That fact, however, merely accentuates the need for review by this Court, for we maintain

that the court of appeals' decision not only conflicts with the law in two other circuits but is also inconsistent with *Jong Ha Wang* and *Phinpathya*.

2. Notwithstanding this conflict in the circuits, respondent asserts that the issue in this case is not worthy of review by this Court because it is "arcane" and "probably unimportant" (Br. in Opp. 3). As we demonstrated in our petition (Pet. 11-13), however, Congress carefully defined the term "child", has amended that definition, and has made clear that the definition is fundamental to the fair and uniform administration of the immigration laws. Indeed, the legislative history reveals the particular importance of the term "child" in the context of suspension of deportation (see *id.* at 11-12). This Court also has addressed at length the meaning and importance of the statutory definition of "child." See *Fiallo* v. *Bell*, 430 U.S. 787 (1977) (discussed at Pet. 14-15). Thus, the issue of who constitutes an alien's "child" under the immigration laws is a question of substantial importance.[1]

While statistics do not exist on the number of times the precise question of a de facto parent-child relationship has arisen before the INS, the issue clearly is not "arcane" or unique. As we noted in our petition (Pet. 19 n.9), the issue

[1]Respondent does not even address, let alone answer, our discussion of the legislative history and *Fiallo*. Respondent does note, however (Br. in Opp. 6-7), that in 1962, Congress amended the suspension of deportation statute by changing the requirement of "exceptional and extremely unusual hardship" to "extreme hardship" for purposes of 8 U.S.C. 1254(a)(1). Nonetheless, that legislation did not broaden the scope of persons whose hardship may be considered and it in no way suggested that Congress's carefully drafted definition of "child" in 8 U.S.C. 1101(b)(1) henceforth should be disregarded. Cf. *Phinpathya*, 464 U.S. at 191-192 n.9 (1962 amendment changing statutory language to "extreme hardship" did not affect the literal interpretation to be given to the phrase "continuous physical presence").

has been litigated in several courts of appeals. Respondent argues (Br. in Opp. 5) that the impact of the court of appeals' decision is nonetheless limited because it will not result in a "full blown trial" each time a de facto parent-child relationship is alleged. As respondent notes (*ibid.*), immigration judges "retain broad discretion to exclude testimony which is not material." That argument, however, misses the whole basis of INS's concern. Under the Third Circuit's approach, a purported de facto parent-child relationship is plainly material, and, as the facts of this case demonstrate, the immigration authorities will be compelled, as a practical matter, to admit evidence concerning such a relationship or face the risk of a later remand.[2]

3. On the merits, respondent errs in contending (Br. in Opp. 7-8) that *Jong Ha Wang* and *Phinpathya* are distinguishable because those cases involve mere exceptions to a purported general rule that the remedy of suspension of

[2]No basis for denying review is provided by respondent's suggestion (Br. in Opp. 5) that "[i]t is highly unlikely that the result of [the court of appeals'] remand would be different * * *." We have assumed that respondent, in raising the issue in this case with the court of appeals in the first place, fully expected that a remand by the court of appeals could well result in suspension of deportation. But even if respondent is conceding that the facts of her case are in any event insufficient to justify suspension of deportation, review by this Court is nevertheless needed to foreclose future litigation based on the court of appeals' erroneous interpretation of the immigration statute. See generally *INS* v. *Rios-Pineda*, No. 83-2032 (May 13, 1985), slip op. 6 (noting incentive of deportable aliens to prolong litigation to postpone deportation).

Respondent errs in further contending (Br. in Opp. 3-4) that the court of appeals' error is "harmless" because the Board of Immigration Appeals (BIA), on remand, must in any event look at the hardship to respondent caused by the hardship to the nieces. The court remanded the case to the BIA solely on the issue of hardship to respondent's nieces, having specifically ruled that respondent had failed to make a sufficient showing of extreme hardship to herself (Pet. App. 3a, 5a).

deportation is to be liberally construed to protect "immediate family members." This Court has made clear that suspension of deportation is an exceptional and highly restrictive remedy. See *Jong Ha Wang*, 450 U.S. at 145; *Phinpathya*, 464 U.S. at 195-196; see also S. Rep. 1137, 82d Cong., 2d Sess. 25 (1952); H.R. Rep. 1365, 82d Cong., 2d Sess. 62-63 (1952). Moreover, as we explained in our petition (Pet. 11-12), Congress explicitly rejected the term "immediate family" in formulating the focus of the hardship inquiry for suspension of deportation.

Finally, respondent contends (Br. in Opp. 5-6), citing no authority, that the definition of "child" in 8 U.S.C. 1101(b)(1) applies only to the issuance of visas and not to suspension of deportation. The definition, however, applies, by its terms, to "subchapters I and II" of the Act. Subchapter I contains the general provisions governing the Act, while Subchapter II contains provisions governing the admissibility, entry, and expulsion of aliens (see 8 U.S.C. 1151-1363). Section 1254, which deals with suspension of deportation, is clearly part of Subchapter II, and the definition of "child" in 8 U.S.C. 1101(b)(1) therefore applies. Since the statutory definition of child is thus controlling, the courts have no authority to expand upon or disregard it. See *Fiallo* v. *Bell, supra.*

For the foregoing reasons and those given in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

SEPTEMBER 1986

DOJ-1986-09

SUPREME COURT OF THE UNITED STATES

IMMIGRATION AND NATURALIZATION SERVICE *v.* VIRGINIA HECTOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 86–21. Decided November 17, 1986

PER CURIAM.

Virginia Hector, a native and citizen of Dominica, West Indies, entered the United States in April 1975 as a nonimmigrant visitor for pleasure. She has remained in this country illegally since April 30, 1975, when her authorization to stay expired. The youngest of her four children, a ten year old boy, resides with her here; the other three children live with their grandparents in Dominica. In 1983, two of Hector's nieces, United States citizens aged 10 and 11, came to live with her in order to attend school in what their parents perceived to be a superior educational system. The nieces' parents continue to reside in Dominica.

The Immigration and Naturalization Service (INS) instituted deportation proceedings against Hector in July 1983. She conceded deportability, but applied for suspension of deportation pursuant to § 244(a)(1) of the Immigration and Naturalization Act (Act), 8 U. S. C. § 1254(a)(1). That section authorizes the Attorney General, in his discretion, to suspend deportation of an illegal alien, and to adjust the alien's status to that of an alien lawfully admitted for permanent residence, if the deportable alien

> "has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of . . . application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in

extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U. S. C. § 1254(a)(1).

An Immigration Judge and the Board of Immigration Appeals (Board) found that Hector satisfied the first two statutory elements—continuous physical residence and good moral character—but that she could not demonstrate extreme hardship to herself, or to her "spouse, parent, or child." With respect to her nieces, the Board determined that, as a factual matter, Hector's separation from them would not constitute extreme hardship to herself;[1] as a legal matter, the Board concluded that a niece is not a "child" within the meaning of § 244(a)(1).

The Court of Appeals for the Third Circuit granted Hector's petition for review and remanded the case to the Board. 782 F. 2d 1028 (1986). The court held that the Board had erred in not giving sufficient consideration to whether Hector's relationship with her nieces was the functional equivalent of a parent-child relationship. The court thus instructed the Board to ascertain whether there was a parental-type relationship, and, if so, to determine whether Hector's nieces would experience extreme hardship as a result of her deportation.[2]

---

[1] The Board found that "[t]he emotional hardship to the respondent due to difficulties encountered by her nieces as a result of her deportation also does not constitute extreme hardship even when combined with the other factors in her case." App. to Pet. for Cert. 12a. Cf. *Contreras-Buenfil* v. *INS*, 712 F. 2d 401, 403 (CA9 1983); *Antoine-Dorcelli* v. *INS*, 703 F. 2d 19, 22 (CA1 1983).

[2] Both the Immigration Judge and the Board had also held, in the alternative, that Hector's relationship with her nieces was not akin to a mother and daughter relationship, and that, in any event, the nieces would not experience extreme hardship as a result of Hector's deportation. The Court of Appeals held, however, that the Board had foreclosed presentation of evidence on these issues, and had not meaningfully addressed each relevant factor. App. to Pet. for Cert. 4a. Judge Garth dissented, concluding that the Board has adequately considered Hector's relationship with her nieces and the hardship issue. *Id.*, at 5a, n. 1.

In so holding, the court relied on its earlier decision in *Tovar* v. *INS*, 612 F. 2d 794 (CA3 1980), which held that the term "child" as used in § 244(a)(1) includes individuals who do not fit within the statutory definition of "child" set out in § 101(b)(1), 8 U. S. C. § 1101(b)(1), if their relationship with the deportable alien closely resembles that of a parent and child.[3]

Because we find the plain language of the statute so compelling, we reverse, and hold that the Board is not required under § 244(a)(1) to consider the hardship to a third party other than a spouse, parent, or child, as defined by the Act. Congress has specifically identified the relatives whose hardship is to be considered, and then set forth unusually detailed and unyielding provisions defining each class of included relatives.[4] The statutory definition of the term "child" is particularly exhaustive.[5] Hector has never claimed, and the

---

[3] The Courts of Appeals have reached varying conclusions on whether hardship to an alien's relative or loved one who does not qualify under the statute's technical definitions as a spouse, parent, or child, must be independently considered in assessing extreme hardship under § 244(a)(1). As indicated, the Third Circuit has held that the Board must look at the hardship that some third parties would experience, even if they do not qualify under the definitional section of the Act. See *Tovar* v. *INS*, 612 F. 2d 794, 797–798 (1980). A number of other circuits have rejected this flexible approach. See, *e. g.*, *Zamora-Garcia* v. *United States Dept. of Justice INS*, 737 F. 2d 488 (CA5 1984); *Contreras-Buenfil*, 712 F. 2d, at 403.

[4] The term "parent" is defined in 8 U. S. C. § 1101(b)(2); the term "spouse" is defined in § 1101(a)(35).

[5] The definitional section provides that:

"(b) As used in in subchapters I and II of this chapter—

"(1) The term "child" means an unmarried person under twenty-one years of age who is—

"(A) a legitimate child;

"(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred;

Court of Appeals did not hold, that the two nieces qualify under that statutory definition.

As we have explained with reference to the technical definition of "child" contained within this statute:

> "With respect to each of these legislative policy distinctions, it could be argued that the line should have been drawn at a different point and that the statutory definitions deny preferential status to [some] who share strong family ties. . . . But it is clear from our cases . . . that these are policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress." *Fiallo* v. *Bell*, 430 U. S. 787, 798 (1977).

Thus, even if Hector's relationship with her nieces closely resembles a parent-child relationship, we are constrained to hold that Congress, through the plain language of the statute,[6] precluded this functional approach to defining the term

---

"(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation;

"(D) an illegitimate child by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;

"(E) a child adopted while under the age of sixteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: *Provided*, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

"(F) a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence: *Provided*, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: *Provided further*, That no natural parent or prior adoptive parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter." § 1101(b)(1).

The suspension of deportation provision, § 1254(a), is part of subchapter II; this definition of "child" therefore applies.

[6] The limiting nature of the plain language is corroborated by the legislative history of both the suspension of deportation provision and the definitional section of the Act.

With respect to suspension of deportation, the Senate rejected a draft of the Bill that focused on the hardship to the "immediate family." See S. 716, 82d Cong., 1st Sess. (1951). In a prepared analysis of S. 716, the INS expressed concern about this undefined term that the INS considered "obscure, uncertain, and difficult, if not impossible, to administer" since the language could "conceivably be claimed to include *any* relative of the alien, by blood or marriage, who might be living with him in his household." 4 INS, Analysis of S. 716, 82d Cong., 1st Sess. 244–2 and 244–3 (1951) (emphasis in original). Instead, the INS asked Congress to list the "particular relatives who are intended to be described." *Id.*, at 244–3. The bill that was eventually passed contained the "parent, spouse, or child" language that is now in effect.

The history of the definitional section similarly demonstrates that Congress has been actively engaged in delineating just how broad it wishes the definition of "child" to be. As originally enacted, the statute defined a "child" as an unmarried legitimate or legitimated child or stepchild under 21 years of age. See *Fiallo* v. *Bell*, 430 U. S., at 797. Congress has since repeatedly fine-tuned the definition of "child." There have been no less then four separate amendments, each adding to or refining the definition. See Act of Sept. 11, 1957, Pub L. 85–316, § 2, 71 Stat. 639; Act of Sept. 26, 1961, Pub. L. 87–301, §§ 1–4, 75 Stat. 650–651; Act of Oct. 3, 1965, Pub. L. 89–236, § 8(c), 79 Stat. 917; Act of Dec. 29, 1981, Pub. L. 97–116, 95 Stat. 1611. In light of this history of close Congressional attention to this specific issue, we are especially bound to pay heed to the plain mandate of the words Congress has chosen.

"child." Cf. *INS* v. *Phinpathya*, 464 U. S. 183, 194 (1984) (refusing to ignore "the clear congressional mandate and the plain meaning of the statute" where it was clear that "Congress considered the harsh consequences of its actions"). Congress has shown its willingness to redefine the term "child" on a number of occasions,[7] but it has not included nieces in that definition or authorized us to adopt a functional definition.[8]

Accordingly, the petition for certiorari is granted, and the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE BRENNAN would grant the petition and set the case for oral argument.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *e.g.*, *Acosta* v. *Louisiana Dept. of Health and Human Resources*, —— U. S. —— (1986) (MARSHALL, J., dissenting).

---

[7] See n. 6, *supra*. Similarly, Congress has shown that it is willing to correct inequities that might result in our applying the plain language of the suspension of deportation provision. In the recently enacted Immigration Reform and Control Act of 1986, Pub. L. 99-——, —— Stat. ——, Congress explicitly amended the Act to "overrule *INS* v. *Phinpathya*, [464 U. S. 183] (1984), which held that any absence, however brief, breaks the continuity of physical presence." H. R. Rep. No. 99-682, pt. 1, p. 124 (1986).

[8] Our decision, of course, does not affect the possibility that Hector may be entitled to relief under the amnesty provisions of the newly enacted Immigration Reform and Control Act of 1986, *supra*.